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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA,
A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

J. F. BLAISDELL

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The County of Mineral prays that a writ of certiorari issue to review the order of the Supreme Court of California, entered on January 21, 1952, in the above entitled case denying petition for a writ of review of an Order of the California Public Utilities Commission entered on July 3, 1951.

Opinions Below

The denial of the petition for the Writ by the California Supreme Court was without an opinion, and the opinion of the California Public Utilities Commission [1] is reported at 50 California Public Utilities Commission 749.

[1] In addition to its own record, Mineral County will refer to the more complete record in the related case of *United States* v. *The Public Utility Commission of the State of California*, No. 205 this term. These references will be indicated as (Govt. R. —).

review in the United States Court of Appeals for the Ninth Circuit. As intervenors, both the United States and the County have filed briefs in that Court.[3]

The California Electric Power Company sells and delivers electric energy at its Mill Creek Plant in Mono County, California, to Mineral County, admittedly a public utility, functioning as the Mineral County Power System, which transmits such energy over its own line for resale to the public in said County. Part of the energy comes from licensed projects, part from nonlicensed sources and in varying percentages.

For more than 13 years (Govt. R. 26) electric energy has been sold to the County by the Company and its corporate predecessor. On October 15, 1948 the Company submitted for filing with the Federal Commission a proposed rate applicable to Mineral County, representing a 43 percent increase (Govt. R. 27), but did not complete the filing (Govt. R. 27). The Company proceeded to bill the County at an increased rate and on March 22, 1949, declared in a letter to the Federal Commission that the Company had decided not to go ahead with the filings (Govt. R. 27). The County protested the higher rates and the absence of filing with the Federal Commission and a public hearing was held in San Francisco March 20-21, 1950, pursuant to a Federal Commission Order to Show Cause. These hearings were before Hearing Examiners for both the Federal Commission and the California Commission and appearances were entered for the California Commission, the Company, the County, and for the Navy.

On April 13, 1951, the Federal Commission issued Opinion No. 212 (Govt. R. 35) ruling jurisdiction to rest with

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[3] Oral argument in this case is set for August 4, 1952 and the California Commission has filed Amicus Curiae briefs therein.

the Federal Commission under both Parts I and II of the Federal Power Act, and making certain orders. Applications for rehearing were filed with the Federal Commission by both the California Company and the California Commission which were denied on June 5, 1951. On June 21, 1951, the Company filed a Petition for Review in the United States Court of Appeals for the Ninth Circuit, No. 12987, being the case of *California Electric Power Company* v. *Federal Power Commission*.

On July 3, 1951, the California Commission issued its own decision No. 45913, 50 California Public Utilities Commission 749 (Govt. R. 19) ruling that jurisdiction rests with the California Commission to the exclusion of the Federal Commission, with respect to the sales of electric energy both to the Navy (government) and the Mineral County Power System (County).

The Government and the County filed timely petitions for rehearing (R. 2, 8) which were denied and under date of August 28, 1951, the County filed a petition for writ of review with the Supreme Court of California (R. 8).[4] The said petition was denied on January 21, 1952, without an opinion, Gibson, C. J., Carter, J., and Spence, J., voting for issuance of the writ (R. 38). Thereafter and under date of February 1, 1952, the County petitioned for rehearing of the denial of petition for writ of review (R. 40) which was denied on February 18, 1952, without opinion. Thus, the Federal Commission and the California Commission, on the identical record, arrived at diametrically opposite decisions.

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[4] In paragraph IV of its petition for a writ of review (R. 1), the county incorrectly referred to a "first supplemental application." This should have been designated "*Second* supplemental application." In paragraph V the County incorrectly used the word "authorizing" instead of "directed."

Specification of Errors to Be Urged

The Supreme Court of the State of California erred:

In affirming the decision of the California Commission, by denying the County's petition for a writ of review and its petition for rehearing and in the following respects:

1. In holding that the Company's sale of electric energy for resale to Mineral County was not "sale to any person for resale" subject to regulation of the Federal Commission under Section 201 (d) of The Power Act, since the definition of "person" in Section 3(3), (4) excludes municipalities.

2. In holding that since the energy sold to Mineral County is at times generated at hydro-electric projects licensed under Part I of The Federal Power Act, the Company's sale to Mineral County is not subject to Federal Commission regulation under Part II.

3. In holding that jurisdiction rests with the California Commission under Section 20, Part I of the Act to the exclusion of the Federal Power Commission on a finding that "(1) each of the states directly concerned, viz., California and Nevada, has provided 'a commission or other authority to enforce the requirements of this Section (Section 20, Part I) within such state', and (2) such states have not, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question."

Reasons for Granting the Writ

1. The California Commission's holding that a municipality is not a "person" under Section 201 (d) because of the definition in Section 3(3), (4) of the Act is in square conflict with the recent case of Wisconsin-Michigan Power Co. v. Federal Power Commission, decided on June 9, 1952, by the United States Court of Appeals for the Seventh

Circuit. In that case, which involved the identical situation of a sale for resale to a municipality, the Seventh Circuit after consideration of the Act's legislative history and purpose, concluded that such sales for resales were subject to federal regulation under Part II. In so holding the Court commented that the "apparent inconsistency was an oversight," "the 'slip' was inadvertent" and the congressional intent was "not so to limit the word 'person' as to exclude any one selling electric energy for resale" (slip opinion, pp. 11, 12). Moreover, the Court states directly: "We see no escape from the postulate that sales made by the power company to distributors for resale are subject only to federal regulation." (Slip opinion, P. 7.)

2. The California Commission ruling that the wholesale interstate rates of a licensee are not subject to regulation under Part II of the Act because of Section 201 (a) and (b), and Section 20, of Part I has been rejected as unsound by this Court in Pennsylvania Water Company vs. Federal Power Commission, 343 U.S. 414.[5] In that case Penn Water argued that "since it is subject to regulation under Part I as a licensee, it cannot be regulated under Part II as a public utility." The Court disagreed and stated that "with some express exceptions not here relevant, the language of Part II of the Act makes all 'public utilities' subject to the regulation it prescribed." And further: "Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government. * * * It would hinder, not help, the Power Act's program if we

[5] The California Commission ruled that the sales to the County were subject to state regulation under Part I and that, since Section 201 (a) declared that federal regulation shall "extend only to those matters which are not subject to regulation by the states," the provisions of Part II do not apply. This Court ruled that "* * * the language of Part II of the Act makes 'public utility' subject to the regulation it prescribes."

should impliedly exempt Part I licensees from the more expansive Part II regulation."

3. The California Commission ruling that it had jurisdiction under Section 20 of Part I is also erroneous since the state of Nevada has not provided a commission or other authority to enforce the requirements of Section 20, Part I. Nevada Statutes, 1925, P. 55, Section 21, Nev. Comp. L. (1929) Secs. 6106 and 6149. (Appendix, *infra*, p. 13). Moreover, not only must the state provide a commission or other properly constituted authority, but that authority must in fact exercise the delegated powers. *Safe Harbor Water Power Corp. vs. Federal Power Commission,* 124 Federal 805-806, *Safe Harbor Water Power Corp. vs. Federal Power Commission,* 179 Federal 179, certiorari denied, 339 U.S. 957. That the Nevada Public Service Commission made no attempt to exercise any powers in this matter is evidenced by the statement of the Chairman at the concurrent hearing of the two Commissions. (R. 24.)

Conclusion

The result of the California Commission's assertion of jurisdiction in this case is to leave Mineral County (and its customers) with the dubious protection of rate regulation by a commission of another State, whose primary concern is the welfare of its own citizens. The County believes that the Federal Power Act was not intended to achieve such a result, but rather to bestow the benefits of national federal regulation upon the County. Moreover, we have shown that the California Commission's ruling conflicts squarely on issues of substantial public importance with this Court's *Penn Water* decision and with the Seventh Circuit's *Wisconsin-Michigan* decision as well as with the

Federal Commission's own ruling in this very situation.[6] It is, therefore, respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

L. E. BLAISDELL.

[6] Because an opinion has not yet been delivered by the Ninth Circuit on the Petition for review of the Federal Commission's order, and because a petition for a writ of certiorari from the ruling in that Court is a probable eventuality, it may be deemed desirable to withhold action in this Court on the present cause.

APPENDIX

Federal Power Act, 16 U. S. C. 791.

Sec. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties; jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation

shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purpose of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

* * * * * * * *

Sec. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the

transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

* * * * * * *

Sec. 3. The words defined in this Section shall have the following meanings for purposes of this Act, to-wit:

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, state, or municipality licensed under the provisions of Section 4 of this Act, and any assignee or successor in interest thereof;

* * * * * * *

(7) "Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry

on the business of developing, transmitting, utilizing, or distributing power.

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Mineral County Power System Act

Section 2 as amended, Stats. 1925, page 55:

Section 2. The board of county commissioners, hereinafter referred to as the "Board of Managers," or the "Board," shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either within or without the State of Nevada, for the purchase of electric energy and current.

In so far as here pertinent, Nev. Comp. L. (1929) Sec. 6106 defines public utility subject to the Nevada Commission's jurisdiction as "every corporation * * * that now or hereafter may own, operate or control * * * any plant or equipment or any part of a plant or equipment *within the State* for the production, delivery or furnishing for or to other persons * * * light, power in any form * * *." (Italics supplied.)

Section 6149, Nev. Comp. L. (1929):

"SELLER NOT DEEMED A PUBLIC UTILITY.—FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to such public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it by virtue of such contract be deemed to be within or subject to the jurisdiction of the public service commission of Nevada in any respect whatsoever, nor shall it thereby be deemed to be in any sense a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada."